

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERSKINE S. AND ELINOR R. AGEE	:	DETERMINATION
	:	DTA NO. 819544
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the Year 1995.	:	

Petitioners, Erskine S. and Elinor R. Agee, 165 Argyle Road, Brooklyn, New York 11218, filed a petition for revision of a determination or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the Administrative Code of the City of New York for the year 1995.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 26, 2004 at 2:45 P.M. Petitioner Elinor R. Agee appeared *pro se* and on behalf of petitioner Erskine S. Agee. The Division of Taxation appeared by Mark F. Volk, Esq. (Sandra Kahn).

Since neither party herein elected to reserve time to file a post hearing brief, the three-month period for the issuance of this determination began as of the date on which the hearing was held.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund for the year 1995 on the basis that the claim was filed after the statute of limitations for refund had expired.

FINDINGS OF FACT

1. Due to a family tragedy which occurred in 1993, petitioner Elinor R. Agee retired from her position as a teacher with the New York City school system in 1995. As a result of some disputes with the Teachers Retirement System which required litigation, petitioners fell behind in the filing of some of their State and Federal income tax returns.

2. Petitioners filed their 1995 Federal income tax return¹ on May 5, 1998 and subsequently received a refund in the amount of \$488.44 on June 30, 1998.

3. Petitioners were not aware that they had not received their 1995 State and City income tax refund until they were preparing to file their 1996 return which was also filed late. Therefore, petitioners sent a letter dated February 18, 2000 to the Division of Taxation (“Division”) along with a copy of their 1995 State and City return (form IT-201) seeking a refund in the amount of \$1,879.12 as shown on the return. The letter and the return were sent in an envelope which bore a United States Postal Service postmark of March 13, 2000 and were received by the Division on March 15, 2000.

4. Petitioners’ State and City return for 1995 indicated that State tax in the amount of \$1,525.58 and City tax in the amount of \$835.54 had been withheld from petitioner Elinor R. Agee’s wages (wage and tax statements were attached to the return) and that after subtracting petitioners’ State tax liability of \$308.00 and their City tax liability of \$174.00, a refund in the amount of \$1,879.12 was due to petitioners.

¹ The Federal return for 1995 was signed and dated on December 11, 1997; however the return was not filed with the Internal Revenue Service until May 5, 1998 due to the fact that petitioners had difficulty in obtaining certain instructions from the Internal Revenue Service.

5. On September 18, 2000, the Division responded to petitioners' letter which indicated that a search of the Division's files had been made which revealed that no return for 1995 had been filed under petitioners' names or social security numbers. Accordingly, the return filed in March 2000 was accepted by the Division as petitioners' original filing of their 1995 return. The Division's letter of September 18, 2000 also advised petitioners that pursuant to Tax Law § 687, the deadline for filing for a refund for 1995 expired on April 15, 1999, or three years from the date that the return was due. Therefore, the Division advised petitioners that their claim for refund for 1995 was denied.

SUMMARY OF PETITIONERS' POSITION

6. Petitioners contend that their 1995 New York State and New York City return was filed at or about the same time as their Federal return which was filed on May 5, 1998 and that their claim for refund was, therefore, filed timely. They admit that the return was not sent by certified mail. They contend that it is likely that the Division lost their return for 1995. Petitioner Elinor R. Agee did not recall how or from where the 1995 State and City return was filed since it was her husband, petitioner Erskine S. Agee, who usually mailed petitioners' tax returns.

CONCLUSIONS OF LAW

A. Tax Law § 687, entitled "Limitations on credit or refund," provides, in pertinent part, as follows:

(a) General. - - - Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later. . . . If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim

B. In the present matter, petitioners' only payment of taxes was by tax withholding from the wages of petitioner Elinor R. Agee. In accordance with Tax Law § 687(i), any income tax withheld from a taxpayer during a calendar year is deemed to have been paid on April 15th of the following year. Therefore, the tax withheld for 1995 was deemed to have been paid on April 15, 1996. Accordingly, a claim for refund of the tax withheld for 1995 would have to have been filed on or before April 15, 1999.

C. In the present matter, while petitioners claim to have filed their 1995 State and City return on or about May 5, 1998, the only 1995 return from petitioners received by the Division was mailed in an envelope with a postmark of March 13, 2000. Petitioners admit that they did not mail the return by certified mail and that they have no documentary proof as to the actual date on which they mailed the return.

When the Division fails to receive a document, the general rule is that proof of ordinary mailing is insufficient as a matter of law to prove timely filing (*Matter of Reeves*, Tax Appeals Tribunal, August 22, 1991; *Matter of Savadjian*, Tax Appeals Tribunal, December 28, 1990; *Matter of Filler*, Tax Appeals Tribunal, August 24, 1989).

D. The Division has established that it has no record of receiving a 1995 return from petitioners which was purportedly mailed by petitioners on or about May 5, 1998. The Division's records reflect that the first time that it received petitioners' return for 1995 was in March 2000 (the return was mailed in an envelope which bore a postmark of March 13th and was received by the Division on March 15th). Accordingly, pursuant to Tax Law § 689(e), the burden is on petitioners to prove that they filed the return before the expiration of the statute of limitations as set forth in Tax Law § 687(a). The testimony of petitioner Elinor R. Agee does not establish how, when or from where the return was allegedly mailed since she admittedly did not mail the return (*see, Matter of Sipam*, Tax Appeals Tribunal, March 10, 1988 [for a general

discussion of the filing of various documents with the Division and the Division of Tax Appeals]). Petitioners could have avoided the risk of mishandling or loss of the return by the United States Postal Service or by the Division had they used certified or registered mail (Tax Law § 691[a]; 20 NYCRR former 146.4[c]), since certification or registration serves as prima facie evidence that a document or payment was delivered. Unfortunately for petitioners, they chose to mail their 1995 return by ordinary mail and, accordingly, now bear the risk of nondelivery or mishandling.

E. The petition of Erskine S. and Elinor R. Agee is denied and the Division's notice of disallowance dated September 18, 2000 is hereby sustained.

DATED: Troy, New York
October 7, 2004

/s/ Brian L. Friedman
PRESIDING OFFICER